APPEAL NO. 93161

A contested case hearing was held on January 13, 1993, in (city), Texas, (hearing officer) presiding as hearing officer. She determined that the respondent (claimant) was the employee of the employer carrying workers' compensation insurance coverage with appellant (carrier) and that a compensable injury was sustained by the claimant in the course and scope of his employment. Accordingly, benefits were ordered under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). Carrier urges that two of the hearing officer's findings of fact are against the great weight and preponderance of the evidence and that there is no evidence to support one of the hearing officer's conclusions of law. Claimant, in essence, asks that the decision of the hearing officer awarding benefits be affirmed.

DECISION

With necessary modification, the decision is affirmed in the award of benefits under the 1989 Act.

Two issues were considered at the contested case hearing: (1) whether the claimant was an employee of (employer) on (date of injury), and (2) whether or not the claimant was injured in the course and scope of his employment. Briefly, the evidence consisted of the testimony of the claimant and three witnesses called on his behalf. The carrier's case consisted of presenting a document entitled "Joint Venture Agreement of (employer). There was evidence that the claimant sustained an injury to his back when he picked up a jack in order to connect a trailer to a truck pursuant to instructions from a supervisor. He testified, through an interpreter, that when he picked up the jack, his waist "popped and his legs went to sleep." One of his coworkers, (also apparently a supervisor over the claimant), testified that he was there at the time and that he saw the claimant pick up the jack and "I heard that it popped." He stated that he told the foreman about it the following Monday after the claimant could not get up the day following the injury. Another coworker also testified that he was present and saw the claimant when he injured himself and that everybody knew the claimant got hurt. Medical records, including a computerized transaxial scan, indicate some midline and diffuse soft disc protrusion. The hearing officer determined that the claimant sustained a compensable injury while in the course and scope of his employment.

In the contested case hearing aspect of the dispute resolution process, the hearing officer is the fact finder (Article 8308-6.34(g)) and is the sole judge of the relevance and materiality of the evidence and of the weight and credibility to be given the evidence. Article 8308.6.34(e). Where there is sufficient evidence, as we find here, to support the determinations of the hearing officer and they are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust, there is no sound basis to disturb the decision. In Re King's Estate, 244 S.W.2d 660 (Tex. 1951); Texas Workers' Compensation Commission Appeal No. 92232, decided July 20, 1992. We affirm the conclusion and decision in holding that the claimant sustained a compensable injury

while in the course and scope of his employment. We note the decision indicates that temporary income benefits will be paid "if (the claimant) can establish or has established that he had disability for eight or more days." Disability was not an issue at this hearing.

The more troublesome issue in this case concerns the particular arrangement under which the claimant was employed. The evidence is clear that the claimant was hired and worked for employer, as testified to by Mr. G, the person who was doing business as (d/b/a) employer. According, to Mr. G, he and Mr. D, who owned employer., entered into a formal 40 page Joint Venture Agreement which is signed by both Mr. G and Mr. D and dated February 12, 1992. The agreement generally concerns a joint business to bid on and perform projects similar to the project which was being done at the time the claimant was injured. Also, the agreement provides four methods of terminating or ending the joint venture. As carrier's position aptly infers in urging that the agreement was "in full force at the time of the alleged injury," there is no evidence that any of these methods to terminate or end the joint venture were ever initiated. The agreement also provides that (employer) would, as part of its responsibilities, rights and duties with respect to the joint venture, "hire, maintain and provide adequate staffing to administer, supervise and complete all projects. . . ." The agreement also provides that the "Venturers" shall obtain and maintain workers' compensation insurance, and indicates that providing evidence of such coverage is a condition to the agreement becoming effective. Carrier complains that the hearing officer "has ignored the agreement and has made erroneous finding of fact based on a borrowed servant theory." We tend to agree on both accounts. First, there is no mention of the agreement in the disposition of the case by the hearing officer and we cannot determine what consideration, if any at all, was given to it. Secondly, the hearing officer's finding that the claimant was an employee of (employer). at the time of his injury seems inconsistent with her determination that at the time of the injury, (employer). had the right to control the claimant, indicating that he was being considered a "borrowed servant" or perhaps an independent contractor. Nonetheless, we do not think this controls the disposition of the case.

One of the findings of fact indicates that the carrier maintained a workers' compensation insurance policy for (employer). There is no indication one way or the other concerning any other workers' compensation coverage. The hearing officer's other findings appear to be based upon testimony of the claimant that he believed that he worked for (employer). at the time of the injury, that (employer). issued paychecks to the claimant, and the testimony of Mr. G, the owner of (employer) and the brother-in-law of the claimant. We note that on cross-examination, the claimant stated he did not remember who he worked for on June 27th and that "maybe we worked for both." Mr. G testified that in his business as (employer) he hired claimant before February 12, 1992, that on that date (employer) and (employer). entered into a Joint Venture, and that claimant continued working. Mr. G testified that the Joint Venture worked a project in Houston and that since they did not make much money he thought that the Joint Venture would not continue after that. He indicated

that Mr. D bid on the project on which the claimant was injured and that he, Mr. D, arranged for Mr. G to go to the project site and that he wanted Mr. G to do the project. Mr. G indicated the arrangements were that he would be paid weekly and that after all the costs were covered at the end of the project, they would split "50/50." He stated he thought he was an employee of (employer)., as well as the claimant. He stated that there was never anything in writing to indicate the Joint Venture Agreement was ended. He denied that either he or the claimant were working as independent contractors or subcontractors at the project in question. On cross-examination, Mr. G testified that at the time of the accident, the claimant worked for (employer). and (employer). He also testified that it has always been, ever since the agreement was signed in February, that (employer). took care of all the payroll by check for the hours worked by the crews. He also indicated that he brought the crew "up from" Houston, including the claimant, to do the project.

Although not mentioned in the Decision and Order of the hearing officer, we believe the evidence overwhelmingly supports the position advanced by the carrier on appeal that the Joint Venture Agreement "was in full force at the time of the injury," and we note such position is not specifically opposed in the claimant's response. Therefore, we believe the case can and should be appropriately resolved accordingly. Lawler v. Dallas Statler-Hilton Joint Venture, 793 S.W.2d 27, (Tex. App.-Dallas 1990, error denied) is instructive in this regard although the case involved a reverse of the situation here; that is, whether a partner or joint venturer is an employer of the partnership's or joint venture's employees thereby being protected from a separate negligence action under the workers' compensation statute. The court held that "an individual partner or an individual member of a joint venture is an employer for the partnership's or joint venturer's employees for purposes of the Texas workers' compensation law." In that case, Lawler worked for the Dallas Hilton Hotel, was injured on the job, and received an award from the workers' compensation carrier. She subsequently brought a negligence action against Dallas Statler-Hilton Joint Venture (Joint Venture), Hilton Hotels Corporation (HHC), The Prudential Insurance Company (PIC), and another party not germane to this case. The defendants moved for summary judgment, which was granted and the case was affirmed. A Texas Employers'Insurance Association policy, which named HHC and Dallas Hilton as the insured, paid the workers' compensation award to Lawler. The hotel was owned by the Dallas Statler-Hilton Joint Venture. PIC and HHC were the individual members of the joint venture. Under an agreement, HHC managed the hotel on behalf of the joint venture. Summary judgment was granted on the defense position that Lawler was precluded, pursuant to the exclusive remedy provision of the Texas Workers' Act from suing the joint venture or its individual members, HHC and PIC. After noting that the Texas Workers' Compensation Act provides the exclusive remedy for an employee injured in the course and scope, that Lawler was barred from pursuing a claim for personal injuries against her employer, and indicating that with respect to a partnership, Texas courts have held that where a partnership is an employer, the individual partner is also an employer and not an employee, the Court went on to state that no Texas court, to their knowledge, had previously directly addressed the issue of whether the individual

partner in a partnership or the individual member of a joint venture is an employer and thus immune from suit. After tracing authorities in other jurisdictions, the court concluded that the majority agreed that a partner is also an employer. The court stated (793 S.W.2d at 34) that "[i]n our opinion, the better rule in cases involving claims by employees against employers is the majority rule that the individual partners or joint venturers are also employers of the partnership's or joint venturer's employees." In answer to Lawler's attempts to restrict employer status to HHC for purposes of the workers' compensation law by limiting employer status to that entity shown to have actual control over the claimant at the time of the accident, the court stated:

> Since we conclude that as a matter of law all the individual members of a joint venture are employers, this test has no meaningful application under the facts in this record. An employer is, by definition, one with the right of control; and the joint venture, as principal, retained the right of control over those whom its special agent employed.

The court also discounted Lawler's personal belief that she was employed only by HHC, noting that it does not create a material fact issue because as a matter of law the joint venture, as well as its individual member HHC, is one of her employers. Also, it mattered not that the workers' compensation policy named only HHC and "Dallas Hilton" as the insured.

Under the facts of the instant case, and following the guidance of the court in Lawler, *supra*, we conclude that the position advanced by the carrier, with overwhelming support in the evidence, established that the claimant was an employee of the Joint Venture. However, regardless of whether he is called an employee of the Joint Venture, an employee of (employer)., or an employee of (employer), under the facts of this case, the result is the same. Under the teachings of Lawler, *supra*, the carrier is liable for appropriately determined benefits under the 1989 Act. We can see no reason in logic or law not to hold that if an employer with workers' compensation insurance coverage is protected under circumstances analogous to the facts in this case, that such employer's

carrier is likewise liable for benefits conferred by the 1989 Act. Accordingly, with the modification of the hearing officer's Decision and Order consistent with this opinion, her decision and order are affirmed.

Stark O. Sanders, Jr.
Chief Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge